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JAN 23 1982
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No. 80-1714

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner,
Alabama Department of Corrections and
JAMES D. WHITE, Warden, Holman Prison,
Petitioners,

v.

JOHN LOUIS EVANS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does *Beck* v. *Alabama*, 447 U.S. 625 (1980), require the reversal of all Alabama pre-*Beck* capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. In a federal habeas corpus proceeding may harm and prejudice be presumed, or must they be alleged and proven by the habeas petitioner?

3. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

4. May a federal court properly refuse to certify state law questions otherwise within the rule of *Bellotti* v. *Baird*, 428 U.S. 132 (1976), on the sole ground that preemptive decision of the affected federal constitutional issues moots the state law questions?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing the district court's denial of the petition for writ of habeas corpus is reported as *Evans* v. *Britton*, 628 F.2d 400 (5th Cir. 1981) and appears in the appendix to the petition for writ of certiorari at 15a-22a. The extension of the opinion of the Court of Appeals on petition for rehearing is reported as *Evans* v. *Britton*, 639 F.2d 221 (5th Cir. 1981) and appears in the appendix to the petition for writ of certiorari at 3a-14a. The opinion of the District Court is reported as *Evans* v. *Britton*,[1] 472 F.Supp. 707 (S.D. Ala. 1979) and appears in the appendix to the petition for writ of certiorari at 46a-128a.

JURISDICTION

The jurisdiction of this court rests upon 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 15, 1980. An extended opinion was filed on March 8, 1981. Petitioners filed a timely petition for certiorari which this Court granted on June 22, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted";

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

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[1] The caption of the District Court opinion misspells the name of Robert Britton who was them Commissioner of the Alabama Department of Corrections.

This case also involves the following statute of the State of Alabama

Title 13, CODE OF ALABAMA (1975)

CHAPTER II

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

§ 13-11-1. Limitation On Imposition Of Death Penalty Or Life Sentence Without Parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty shall be fixed as punishment only in cases and in the manner herein enumerated and described in 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975), No. 213, § 1.)

§ 13-11-2. Aggravated Offenses For Which Death Penalty To Be Imposed; Felony-Murder Doctrine Not To Be Used To Supply Intent; Discharge Of Defendant Upon Finding Of Not Guilty; Mistrials; Reindictment After Mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

* * *

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

* * *

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearings As To Imposition Of Death Penalty Or Life Sentence Without Parole After Conviction; Admissibility Of Evidence; Right Of State And Defendants To Present Arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any of such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the

United States or of the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination Of Sentence By Court; Court Not Bound By Punishment Fixed By Jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating or mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction And Sentence Of Death Subject To Automatic Review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

§ 13-11-6. Aggravating Circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating Circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment Of Experienced Counsel For Indigent Defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court-appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

§ 13-11-9. Effective Date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

STATEMENT OF THE CASE

1. Pre-Trial Proceedings

John Louis Evans was tried in the Circuit Court of Mobile County for the robbery and intentional murder of Edward Nassar. After his arrest in Little Rock, Arkansas, and return to Mobile, Evans testified before the Mobile County Grand Jury concerning the killing of Mr. Nassar.

Although he freely admitted his participation in the robbery it is clear from his own testimony that he did not enter the victim's pawn shop intending to kill anybody (Tr. 335, J.A. 21).[2]

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[2] Consistent with the state's denomination, references to "Tr." are to the two volume state court trial transcript. References to "R" are to the record on appeal. References to J.A. are to the Joint Appendix prepared for this court. References to "Pet. App." are to the Appendix to the certiorari petition.

Q: Well, have you ever thought of just going out and getting a job, a decent job?

A: Oh, I've done that, sure.

Q: And what made you just leave the job *(inaudible)* and go to, uh, to robbing people?

A: Well, uh, I don't know. Uh, it's kinda like an inner drive, I guess, you know, it's something that I always, huh, I've always done ever since, you know, I was a kid. And, uh, it's the easiest way I knew of to make money with, uh, usually the least amount of trouble, you know. Uh, like I said, *you never want to hurt anybody and we always try to pick places to rob that we didn't think anybody would get hurt, you know*. (Emphasis added).

Further, his testimony indicates that his shooting of the victim was an instinctive reaction for self-preservation.

Evans testified as follows (Tr. 325; J.A. 12):

Q: It's my understanding that you made the statement before that you shot him because it was either a matter of him or you, is that correct?

A: Well, you know, my deduction at the time was he was going for a pistol and, uh, I wasn't going to stand there and let him shoot me with it so I fired.

Wayne Ritter, Evans' co-defendant testified to the same effect (Tr. 340):

Q: Had you discussed what you were going to do when you go in the s-store?

A: Yeah. John had a pistol and we decided not to take the sawed-off rifle in because it was too big. And I had, uh, some .38 shells. And I was going to ask to see a pistol then John was going to draw his; I would load mine. And we were going to take some guns and the money in the cash register and leave. Uh, but when John, uh, drew his pistol, Nassar dropped down and

started crawling toward the office area. And he reached up, like he was going for a gun and that's when he was shot.

Evans further testified (Tr. 33-334, J.A. 19):

Q: And, uh, at the time that you shot Mr. Nassar in the back, you knew it was wrong, did you not?

A: I didn't take time to think abou it. Uh, . . .

Q: You were going to shoot him [Nassar] if he made that move [for his gun]?

A: I was going to shoot him if he reached for a-a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody if you don't have to. That's — that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well that's — *that's pure instinct. That's self-preservation.* I'm going to fire; I'm not going to waste any time and, uh, I felt like, uh, you know, of course, the man, if I would have — if — it hadn't happened so quick, if I'd had have time, I would have told him, you know, don't do it, you know, but it just happened too quick.

Following his testimony and that of his co-defendant, the grand jury returned indictments against both. At arraignment, Evans plead guilty, but the trial judge, correctly interpreting the requirements of Alabama law, set the matter of Evans' guilt for "submission to a jury" eight days later. (Tr. 68).

2. Trial Proceedings

Evans' trial proceeded in exactly the same fashion as every other trial. The judge conducted voir dire of the jury and stated:

the only jurors that I can have sitting in the trial of this case are jurors who can give me their assurance, individually under oath, that they will not allow anything to influence their verdict in this case in this courtroom. You have to give me your assurance, under oath that if you have read or

> heard anything about the case you are capable of putting that out of your mind, and reaching a verdict on the evidence presented in this courtroom.

(J.A. 29).

Following jury selection wherein both sides utilized their peremptory challenges, (Tr. 89-93), the Rule of Sequestration was invoked and both the state and defense made opening statements. (J.A. 31-32). After the presentation of the state's evidence, Evans testified. He told the jury "I would rather die by electrocution than to spend the rest of my life in the penitentiary." (J.A. 38).[3]

Following the arguments the judge charged the jury on the elements of the crime and the standard of proof beyond a reasonable doubt. (J.A. 44-45). He included the admonition, "I can only tell you that in reaching your verdict, you may not take the simple approach and go no further and say, if the defendant admits he did it, we go no further." (J.A. 44).

The jury returned a verdict of guilt which carried with it a mandatory sentence of death. (Tr. 227). The next day, the trial judge held a sentencing hearing wherein he accepted the sentence of death as fixed by the jury. (Tr. 241).[4]

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[3] Because of the existence of the preclusion clause the only two realistic possibilities for Evans' sentence were death or life imprisonment *without* the possibility of parole. Had the preclusion clause not existed, the jury could have found Evans guilty of felony murder, which is first degree murder under Code of Alabama 1975, § 13-1-70 and is punishable by life imprisonment *with* the possibility of parole. All killings during the commissions of felonies are not capital crimes under Alabama law, and simple felony murder is not a capital offense. *Ritter* v. *State*, 375 So.2d 270 (Ala. 1978).

[4] The conviction and death sentence of respondent's co-defendant Ritter were originally reversed in *Ritter* v. *State*, No. 77-798 (Ala. May 8, 1981) (on remand) *extended on rehearing, id.* (Ala. June 12, 1981). That decision was vacated and remanded by this court on October 13, 1981, "for further consideration in light of *Reed* v. *State*, ____ So.2d ____ (Ala. 1981),

3. State Appellate Court Proceedings.

Evans' conviction and sentence wwere affirmed by the Alabama Court of Criminal Appeals in *Evans* v. *State*, 361 So.2d 654 (Ala. Cr. App. 1977) and by the Alabama Supreme Court in *Evans* v. *State*, 361 So.2d 666 (Ala. 1978). This court denied certiorari in *Evans* v. *Alabama*, 440 U.S. 930 (1979).

4. The Federal District Court

Evans filed a petition for federal writ of habeas corpus alleging *inter alia* that the Alabama death penalty law under which he was tried and sentenced violated the Eighth and Fourteenth Amendments (R. 3-4). He specifically alleged that the existence of the portion of the Alabama law which precluded juries from considering evidentially supported lesser included offenses violated his right to due process of law. [5] On June 12, 1979, the District Court denied relief and Evans appealed.

5. The Court of Appeals

In his presentation to the Court of Appeals, Evans attacked the constitutionality of the Alabama death penalty statute on several fronts. He challenged not only the preclusion clause but also raised various issues concerning lack of jury sentencing,

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Alabama v. *Ritter*, ___ U.S. ___, (81-247). On December 11, 1981, the Alabama Supreme Court, on remand, issued an opinion reversing Ritter's conviction on federal constitutional grounds. *Ritter* v. *State*, No. 77-798 (Ala., December 11, 1981) Slip. Op. p. 2. Three justices dissented from that holding, but even they believed that Ritter was entitled to a new trial on the "issue of sentencing." *Id.* p. 3.

[5] The preclusion clause originally appeared at Code of Alabama, 1975 § 13-11-2(a). Following this court's decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), on remand, the Alabama Supreme Court judicially recreated the Alabama death penalty law so as to permit trial juries to consider evidentially supported lesser included offenses and to give the trial jury sentencing authority. *See Beck* v. *State*, 396 So.2d 645 (Ala. 1980).

appellate review and the overall operation of the statute. During the pendency of the appeal, this court issued its opinion in *Beck* v. *Alabama*, 447 U.S. 625 (1980). After requesting supplemental briefs on the impact of the *Beck* decision on this case, the Fifth Circuit reversed the District Court in a decision styled *Evans* v. *Britton*, 628 F.2d 400 (5th Cir. 1980) (Pet. App. 15a-22a). The court, drawing on this Court's *Beck* opinion, found that the constitutional violation could not be harmless error because "the peculiar nature of the offensive statute would infect virtually every aspect of any capital defendant's trial from beginning to end." 628 F.2d at 401.

The court also declined to certify certain questions of law to the state courts as the state had requested, since "as to Evans, certification would be an empty exercise." *Id.*

In response to a petition for rehearing with a suggestion for rehearing en banc filed by the state, the Fifth Circuit extended its opinion. *Evans* v. *Britton* 639 F.2d 221 (5th Cir. 1981). (Pet. app. 3A-12A). In its extended opinion, the court rejected the state's contention that Evans' attempted plea of guilty barred his constitutional challenge to the statute.

It also found, based on this court's opinion in *Beck* that no showing of prejudice would be required for reversal. Because the court reversed Evans' conviction and death sentence on grounds relating to the preclusion clause, it did not reach the other constitutional issues presented by him on appeal. [6]

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[6] The issues presented to the Fifth Circuit on appeal are as follows:

1. Whether Alabama's unique statutory prohibition which precludes juries in capital cases from considering factually established lesser included offenses, deprives all persons accused of capital crimes of the due process and equal protection rights guaranteed them by the Fourteenth Amendment and violates the cruel and unusual punishment prohibition of the Eighth Amendment.

2. Whether the role Alabama has assigned the jury of compelling it to impose a death sentence upon every defendant convicted of a capital crime

SUMMARY OF ARGUMENT

In its decision in *Beck* v. *Alabama*, 447 U.S. 625 (1980), this court held that the Alabama death penalty law was unconstitutional because it prevented a jury in a capital case from considering evidentially supported lesser included offenses. The Court also found that two other constitutional defects inhered in the Alabama statute: (1) the interference with the neutral fact-finding worked by the seemingly mandatory death sentence, 447 U.S. at 640 and (2), the "manifest . . . tendency (of the jury's verdict) to motivate the judge to impose the same sentence as the jury did." 447 U.S. at 645. The State contends that Evans was not injured by the preclusion clause. Even assuming the state's contention that the preclusion clause had no effect on Evans is correct, he still suffered injury at the hands of the other constitutional defects identified by this court.

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while precluding it from considering mitigating circumstances violates the Eighth and Fourteenth Amendments.

3. Whether Alabama's procedure of deferring the trial judge's consideration of aggravating and mitigating circumstances until after the jury has mandatorily imposed a sentence of death infringes a capital defendant's right to unprejudiced sentencing in violation of the Eighth and Fourteenth Amendments.

4. Whether Alabama's failure to require that aggravating circumstances be proved beyond a reasonable doubt violates the Fourteenth Amendment's Due Process Clause.

5. Whether Alabama's failure to provide a system of comparative reveiw of sentences and to empower its appellate courts to vacate death sentences in appropriate cases renders its death penalty statute violative of the Eighth Amendment.

6. Whether the overall operation of Alabama's death penalty statute is so prejudicial to the rights of a capital defendant at both the guilt and sentencing stages that it violates both the Eighth Amendment's Cruel and Unusual Punishment Clause and the Due Process Clause of the Fourteenth Amendment.

Evans, like Beck, was convicted by a jury which may have been impermissibly affected by the apparently mandatory nature of its verdict form. He was also sentenced by a judge who reached his sentencing decision only after the jury verdict of death was announced and who was required to give weight to the "fixing of the punishment at death by the jury." Thus, even if Evans was not harmed by the preclusion clause, his case was clearly prejudiced by the application of the other unconstitutional provisions identified and criticized by this court in *Beck*.

With regard to the preclusion clause, however, it is apparent that Evans was prejudiced both presumptively and actually by its operation. Although the state attempts to pigeonhole the constitutional violation caused by the preclusion clause into the "fundamental fairness" standard, it does not fit. The violation is not a fundamental fairness type but is, as this court's opinion in *Beck* makes clear, a violation of the Eighth Amendment. In Eighth Amendment cases no showing of harm or prejudice is required to establish the constitutional violation.

Moreover, because the violation implicates the Eighth Amendment, no showing of harm or prejudice is required for reversal. In none of its most recent death penalty opinions nor in any of the hundreds of cases in which the death sentence was vacated in the wake of *Furman* v. *Georgia*, 408 U.S. 845 (1972) did this court examine whether a particular petitioner before it has been harmed.

In addition, this case fits squarely within this court's decisions which have not required a showing of harm or prejudice as a pre-requisite to reversal where a constitutional error infected the entire trial process and thus the content of the record. In those cases, because a precise evaluation of prejudice is impossible, no showing of harm or prejudice is required. *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

Even if prejudice is not presumed to flow from the preclusion clause, the state has not met its burden of proving that the error worked by the preclusion clause was harmless beyond a reasonable doubt. The state makes a two-pronged argument that Evans was not harmed based on its own amateur psychological evaluation of how Evans would have proceeded had the preclusion clause not existed. Their argument hardly amounts to proof beyond a reasonable doubt. Evans' choice at trial was death over life imprisonment without parole. Had the constitutionally required possibility of conviction of a lesser included offense attended by a lesser penalty existed — such as that of first degree murder with its attendant punishment of life imprisonment with the possibility of parole after 10 years, Evans may well have made a very different choice as to how to proceed.

Additionally, the record in this case, incomplete though it is, demonstrates that Evans was harmed by the preclusion provision. Evans' testimony before the Grand Jury raises a significant question concerning Evans' intent to kill the victim. Had that evidence been developed by competent counsel and presented at trial, it clearly would have warranted an instruction on the lesser offense of first degree murder had the preclusion clause not been in effect.

The state continues to try to argue around the effect on Evans of the unconstitutional Alabama death penalty law by arguing that Evans' attempted plea of guilty waives his constitutional challenges. Under Alabama law, his plea had no effect because in capital cases a jury must determine guilt and sentence. *Prothro* v. *State*, 370 So.2d 740 (Ala. Cr. App. 1979). As Alabama law requires, Evans was tried before a jury in precisely the same manner as he would have been had he pleaded not guilty.

There are also two reasons why, as a matter of federal law, Evans' plea did not waive federal habeas review of his constitutional challenges. First, "although termed a 'guilty plea' . . .

[Evans] plea had legal consequences quite different from the consequences of the pleas entered in the traditional guilty-plea cases." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 (1975). Second, the constitutional deprivations of which Evans complains — the faulty fact-finding process at his trial and the institutionalized bias for death at his sentencing are deprivations that occurred *after* Evans pleaded. Both *Lefkowitz, supra.* and *Tollett* v. *Henderson*, 411 U.S. 258 (1973) make clear that such claims are not waived or forfeited under federal law.

Lastly, settled authority compels the conclusion that the court below properly refused to certify state law questions concerning the existence of lesser included offenses in the trial record and the effect of Evans plea. Certification is proper only where there exists an "uncertain issue of state law" *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971). The issues sought to be certified are not uncertain, but rather quite settled. Federal courts are obviously as competent as state courts to apply settled state law to the facts of a particular case. Further, the state's request for certification was a blatant attempt at forum manipulation. The state specifically waived all exhaustion requirements below, yet before this court complains of the damage the decision below wreaked on federalism. The state's action in this case shows that the state's interest is not in maintaining the proper relationship between state and federal courts, but rather in seeking whatever forum it believes to be most favorable at a given time.

Evans is entitled to have his conviction reversed and his death sentence vacated, and the decision below should be affirmed.

I. THIS COURT'S DECISION IN BECK V. ALABAMA CONTROLS THIS CASE.

The state argues that Evans' conviction and sentence of death under the now defunct [7] Alabama capital punishment statute can stand because Evans, unlike Beck, failed to present any evidence at trial that could have justified a conviction of a lesser included offense. Because of this failure, the state reasons, Evans cannot demonstrate that he was harmed by the statute's unconstitutional provision precluding jury consideration of lesser included offenses. We demonstrate at pp. 20-23, *infra* that the distorting effect of the preclusion clause on record in this case is such that a precise determination of the nature and degree of harm suffered by Evans because of it is impossible, rendering reversal of his conviction necessary. We further show that even the imperfect record that does exist in Evans' case plainly reveals that he was harmed by the application of the preclusion clause to his case. Yet even assuming that the state's contention that the preclusion clause had absolutely no effect on Evans' case is correct, the state's differentiation of this case from *Beck* solely on the grounds that Evans presented no evidence of a lesser included offense at trial necessarily sweeps aside the effect on Evans' case of two constitutional defects other than preclusion provision that this Court in *Beck* found inhered in the Alabama statute: (1) the interference with neutral fact finding worked by the seemingly mandatory death sentence, 447 U.S. at 640, and (2) the "manifest . . . tendency (of the jury's verdict) to motivate the judge to impose the same sentence that the jury did." 447 U.S. at 645, in contravention of the judge's duty impartially to weigh aggravating and mitigating circumstances. [8]

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[7] In its decision on remand of *Beck* from this Court, the Alabama Supreme Court substantially revised Alabama's death penalty statute and the procedures pursuant to which a capital defendant can be sentenced to death. *Beck* v. *State*, 396 So.2d 645 (Ala. 1981).

[8] Both of these defects were challenged by Evans in the District Court and in the Court of Appeals.

Evans suffered no less than Beck did from these defects. With respect to the first — the mandatory nature of the jury verdict form — the state argues that Evans should not be heard to complain since, at most, it encouraged the jury improperly to acquit him. This, of course, was equally true of the verdict form in Beck's case. The state simply misapprehends the problem with a mandatory or apparently mandatory death penalty. The problem is not primarily that such a provision motivates improper acquittals, but rather that it "makes the guilt demonstration depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue," *Beck* v. *Alabama, supra,* 447 U.S. at 640. The possibility that the mandatory verdict form might benefit a particular defendant in a particular case is subsidiary to the fact that "in every case" in which it is required, it "introduce[s] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." *Id.* at 643. The mandatory jury verdict of death was required in Evans' case just as it was required in Beck's (Tr. 224, 227; J.A. 44). Thus, no less than in Beck's case, the jury's determination of Evans' guilt may have been impermissibly infected by its unguided "feelings as to whether or not [Evans] deserves the death penalty." *Id.* at 640.

Just as there is no difference between Evans' case and Beck's in the way in which the mandatory verdict form infected the jury's guilt determination, there is no difference between their cases in the improper pressures brought to bear on the sentencing judge as a result of the mandatory verdict form. As did the sentencing judge in *Beck,* the sentencing judge in Evans' case came to the sentencing proceeding — a proceeding this court has held to be a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina,* 428 U.S. 280, 304 (1976) (Joint Opinion) — only after the jury's verdict sentencing Evans to die, rendered without any consideration of mitigating circumstances, had been

publicly pronounced and publicized. In performing the constitutionally required task of weighing aggravating and mitigating circumstances, Evans' sentencing judge, like Beck's, labored not only under these practical obstacles to treating the jury's imposition of the death penalty as being purely advisory," 447 U.S. at 645 n. 22, but also under the impermissible statutory obligation to give weight to "the fixing of the punishment at death by the jury." Code of Alabama, (1975) § 13-11-4.

In sum, the state hinges the applicability of this Court's decision in *Beck* to the facts of this case completely upon the effect that the unconstitutional preclusion clause had on Evans' case. The preclusion clause, however, is only one of several defects this Court found in the capital statute under which Beck and Evans were prosecuted, convicted and sentenced to die. Even if Evans was not harmed by the preclusion clause — and we demonstrate *infra* pp. 26-29 that he was — his case was clearly prejudiced by the application of the other unconstitutional provisions identified and criticized by this Court in *Beck*.

II. EVANS WAS BOTH PRESUMPTIVELY AND ACTUALLY PREJUDICED BY THE PRECLUSION CLAUSE

A. The Constitutional Violation In This Case Does Not Arise Under Fundamental Fairness Principles Of The Due Process Clause And Thus No Showing Of Harm Or Prejudice Is Required To Establish It.

It is necessary at the outset to clarify certain principles concerning constitutional error on which the state has purportedly relied in urging reversal. Since the state's argument on these principles confuses and commingles the concepts of prejudice and harm, we feel compelled to set forth those principles and show how they apply to the case *sub judice*.[9]

[9] There is no suggestion that the claims asserted by Evans were raised in untimely fashion and are thereby subject to waiver or procedural default. Thus any requirement that a habeas petitioner establish cause and prejudice in the face of waiver or procedural default, *see Wainwright* v. *Sykes*, 433 U.S. 72 (1977) is not implicated here.

This court has previously held that in certain cases involving trial error, a Fourteenth Amendment Due Process violation arises only when the error complained of "so infects the entire trial that the resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). In those cases, reversal is required only when the "fundamental fairness" of the trial is affected. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974). Through these cases, the Court seems to suggest that harm must be demonstrated as a pre-requisite to the finding of a due process violation. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). The state tries to pigeonhole this case into that doctrine. It does not fit.

1. The constitutional violation in this case is an eighth amendment violation

Evans was tried, convicted and sentenced to death under the same statute which was declared invalid in *Beck* in part because of the preclusion clause. As the language of this Court's opinion in *Beck* plainly shows, the preclusion clause operated in a manner which violated the Eighth Amendment. *Beck* repeatedly refers, not to the "fundamental fairness" cases, but to this Court's Eighth Amendment jurisprudence which requires more reliable procedures in capital cases. [10] In fact, *Beck* specifically condemns the Alabama death penalty statute, especially its preclusion clause because it introduces into every case, "[a] level of uncertainty and unreliability . . . (in) the fact-finding process that cannot be tolerated in a capital case." *Becks* v. *Alabama*, *supra*, 447 U.S. at 643. *Beck* thus fully embraces and continues the theme of this Courts' decisions in death cases which have insisted that the Eighth Amendment is implicated

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[10] In fact, the Court specifically chose not to decide whether the Due Process Clause would require the giving of lesser included offense instructions in non-capital cases not governed by eighth amendment standards. *Beck* v. *Alabama*, *supra*, 447 U.S. at 638 n.14.

by a procedure which infects the reliability of the process for deciding who lives and who dies. See *Lockett* v. *Ohio*, 438 U.S. 586, 601 (1978). This Court has never required, as part of that theme, that a showing of harm or prejudice be made as a prerequisite to finding an Eighth Amendment violation. *Beck* v. *Alabama, supra; Lockett* v. *Ohio, supra; Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

B. Because An Eighth Amendment Violation Has Been Shown, Prejudice Is To Be Presumed And No Showing Of Harm Is Required For Reversal

Given an Eighth Amendment violation, no showing of harm and prejudice is required for reversal. In none of its most recent death penalty opinions, nor in any of the hundreds of cases in which the death sentence was vacated in the wake of *Furman* v. *Georgia, see Stewart* v. *Massachusetts*, 408 U.S. 845 (1972) and cases at 408 U.S. 933-940 (1972), did this Court examine whether the particular petitioner before it had been harmed. *See also, Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Moreover, the recognition by this Court that death is quantitatively and qualitatively a "different kind of punishment," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977), and that such a difference requires special reliability that "death is the appropriate punishment in a specific case," *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) militates against a requirement that prejudice be demonstrated as a prerequisite for reversal in an Eighth Amendment case.

C. Because The Preclusion Clause Affected The Entire Trial Process, Making A Precise Determination Of The Prejudice Suffered Impossible, Prejudice Must Be Presumed And Evans' Conviction Reversed Without A Showing Of Harm.

Beyond any distinction based upon the particular constitutional right at issue, there exist important policy grounds requiring reversal of Evans' conviction and sentence without an inquiry into the harm or prejudice suffered.

This Court's jurisprudence has previously divided constitutional error into two categories which implicitly recognize that all trial errors which violate the constitution do not automatically require reversal. *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967). In the first category are cases which require a demonstration of actual prejudice for reversal. In these cases, the prejudice or lack thereof is easily discernible from the record. *See e.g.*, *Kentucky* v. *Whorton*, 441 U.S. 786 (1979); *Harrington* v. *California*, 395 U.S. 250 (1969). In the second category are those cases in which prejudice is presumed so that reversal necessarily follows. Many of the cases in this second category involve constitutional errors which affect the process by which evidence is presented to the trier of fact and made part of the trial record. Such constitutional errors make it impossible for a reviewing court to assess the full impact of the violation. Cases in this category involve denial of the right to counsel, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *White* v. *Maryland*, 373 U.S. 59 (1963); denial of the right to confront witnesses, *Davis* v. *Alaska*, 415 U.S. 308 (1974); and the denial of the opportunity to present certain kinds of evidence. *Webb* v. *Texas*, 409 U.S. 95, (1972); *Ferguson* v. *Georgia*, 365 U.S. 570 (1965). It is readily apparent that the preclusion clause of the Alabama death penalty law declared invalid by this Court is a constitutional error of this second type. The preclusion clause created a basic defect in the trial process. This defect raises doubts whether all relevant evidence is in the record and makes a precise evaluation of the prejudice suffered by Evans because of it impossible.

Although the Alabama preclusion clause did not absolutely bar a defendant from presenting evidence of a lesser included offense, it did not permit the jury to return such a verdict, so that the presentation of such evidence was futile. This Court recognized as much in *Beck*, 447 U.S. at 641-42. [11]

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[11] *See* footnote 13 infra.

Thus, even though lesser included offense evidence may have been available to a defendant, there was no reason to offer such evidence, and hence no reason to make such evidence a part of the trial record. Therein lies the fatal vice of the preclusion clause as it relates to the question of constitutional error in this case. There is absolutely no way for a reviewing court adequately to determine what would or would not have been in the trial record had it not been for the preclusion clause.

At the time Evans was tried, he faced only two possible sentences: death and life imprisonment *without* the possibility of parole. Of the two, he sought death. Had the preclusion clause not existed, Evans' trial jury could have, upon consideration of proper evidence, returned a verdict of first degree murder, a crime punished by a sentence of life imprisonment *with* the possibility of parole. It is entirely possible that Evans, faced with the possibility of parole might well have actively opposed a death sentence. What is certain, however, is that measuring the impact of the preclusion clause on Evans' trial decisions and more importantly, on the content of the trial record is impossible. Thus, any inquiry into whether Evans has been harmed would require " . . . unlike most cases, unguided speculation" *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

The state seeks to minimize the constitutional damage inflicted by the preclusion clause by continually arguing that the "record" should be examined to determine whether there was evidence that would have supported a lesser included offense charge and to determine if the "record" establishes that the preclusion clause caused Evans to forego presentation of lesser included offense evidence. (Brief for Petitioner at 22). [12] This

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[12] Respondent, of course, does not concede that there is no evidence in the trial record to support a lesser included offense charge. *See* pp. 26-29 *infra*. The question of whether such evidence is in the record has not been decided by the state court. Only three of the nine justices of the Alabama Supreme

argument underscores the problem presented by the preclusion clause. Because the clause acted as an absolute bar to jury consideration of lesser included offense evidence, it discouraged any presentation of lesser included offense evidence at trial. *Beck* v. *Alabama*, 447 U.S. at 641-642.[13] Thus, any reference to the "record" as a basis for determining whether respondent was harmed or prejudiced is inappropriate.

It is impossible to speculate as to the contents of the trial record had the preclusion clause not existed. In these circumstances, reversal is required without any inquiry into the precise

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Court have expressed any opinion on the matter. *See Ritter* v. *State*, No. 77-798 (Ala. 1981) (dissenting opinion of Jones, J. joined by Maddox and Adams, J.J.).

[13] The state's argument that Evans should have presented lesser offense evidence in spite of the preclusion clause is sheer nonsense. Under the statute, as it operated, it would have been folly for a defendant to testify that he had been present at a robbery-murder but had not intentionally killed the victim. Although such testimony would have established grounds for a lesser included offense instruction on first degree murder, the statute prevented such an instruction from being given and such a verdict from being rendered.

Under the operation of the Alabama statute, a defendant admitting guilt of first degree murder ran an all but certain risk of conviction of capital murder even if the jury believed that he was not guilty of capital murder. The jury would naturally be loathe to let a confessed murderer go free. Thus, the presentation of lesser included offense evidence created a great risk of conviction for no ostensible gain.

This Court in Beck cited with approval the comments of Justice Shores who noted

> . . . jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires our juries clinical detachment from the reality of human experience.

Jacobs v. *State*, 361 So.2d 640, 651-652 (Ala. 1978) (J. Shores dissenting), *cert. denied*, 439 U.S. 1122 (1979).

nature and extent of the prejudice suffered. *Holloway* v. *Arkansas, supra, Hamilton* v. *Alabama,* 368 U.S. 52, 54 (1969). [14]

D. Even If Prejudice Is Not Presumed To Flow From The Preclusion Clause, It Is The State's Burden To Prove Beyond A Reasonable Doubt That Evans Was Not Harmed By It

Because the constitutional violation caused by the preclusion is not one of the "fundamental fairness" type which requires a showing of harm by the defendant to be cognizable, it must be either the type of violation that is "so basic to a fair trial" that it can never be harmless because prejudice is presumed, or the type of violation that may be found harmless if the state proves beyond a reasonable doubt that it is so. *Chapman* v. *California,* 386 U.S. at 23-24. There are simply no other types of constitutional violations in a criminal case. Thus even if, despite its distortion of the record, the constitutional violation worked by the preclusion clause is not of the type from which prejudice must be presumed, the burden still does not fall upon Evans to show that he was harmed by the clause. At the very least, the state must prove beyond a reasonable doubt that Evans was not harmed by the provision.

The state's approach to such a showing is two-pronged. First, the state examines the record of the evidence presented at trial, and concludes that the evidence presented at trial could not have warranted a lesser included offense instruction. This exercise, of course, simply emphasizes the harm worked by the preclu-

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[14] This Court's decision in *United States* v. *Morrison,* ___ U.S. ___, 40 U.S.L.W. 4088 (Jan. 13, 1981) does not counsel that a demonstration of prejudice is required for reversal in this case. *Morrison* concerns the most intrusive remedy of all, dismissal, and holds that "absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate even though the violation may have been deliberate, *Id.* Respondent makes no claim that his prosecution should be barred; he simply asks that he be tried again in a manner that meets constitutional standards.

sion clause. The existence of the clause may well have caused the defense to forego the presentation of such evidence at trial because its only realistic effect would have been detrimental.

Second, the state reviews the record to determine "whether the record established that the preclusion clause caused Evans to forego presentation of lesser included offense evidence that he would otherwise have presented at trial." Brief for Petitioners at 22. This review apparently caused the state to reconsider its initial assertion that "there was not one jot, speck, or iota of evidence to support any lesser included offense instruction.' *Id.* at 16. Such re-evaluation is well-advised; for as we demonstrate *infra*, pp. 26-29, even the incomplete record in this case reveals substantial evidence capable of supporting a lesser included offense instruction if presented at trial. Instead, the state recreates its own Mailer-like psycho-history of Evans' behavior in this case, proffering its amateur psychologist speculation as to why Evans would have proceeded as he did even in the absence of the preclusion clause. Such musings hardly amount to proof of harmlessness beyond a reasonable doubt.

This is especially so because there is a far more plausible explanation of Evans' actions in this case than the one created by the state. Because of the preclusion clause, Evans faced almost certain conviction under a statutory scheme that provided death and life imprisonment *without parole* as the only two possible punishments. Given this grim choice, Evans, then only twenty-seven years old, chose the former. He explained to the grand jury: "I can't see spending the rest of my life locked up in a penitentiary, you know. I'm too young for that." (Tr. 332; J.A. 18). At trial, he repeated this decision: "I would rather die by electrocution than to spend the rest of my life in the penitentiary." (Tr. 211; J.A. 38). Had the constitutionally required possibility of conviction of a lesser included offense attended by a lesser penalty existed — such as that of first degree murder with its attendant punishment of life imprisonment with the

possibility of parole after 10 years [15] — Evans may well have made a very different choice as to how to proceed. [16]

E. The "Record" In This Case, Incomplete Though It May Be, Does Demonstrate That Evans Was Harmed By The Unconstitutional Preclusion Provision

Because of the harm worked by the preclusion clause, it is impossible to ascertain all of the evidence that Evans might have presented to warrant a lesser included offense instruction. However, even the constitutionally flawed record in this case provides ample evidence that could have been the basis for a lesser included offense instruction had Evans been permitted to pursue such an option at trial.

Evans was tried for and convicted of the capital offense of "robbery or attempts thereof when the victim is intentionally killed by the defendant." Code of Alabama (1975) § 13-11-1(a)(2). Under Alabama's murder statute, § 13-1-70, a "homicide . . . committed in the perpetration of, or attempt to perpetrate any . . . robbery . . . is murder in the first degree," a non-capital offense. The only difference between the capital crime for which Evans was tried and sentenced to death and first degree felony murder is, as § 13-11-2(b) makes clear, the defendant's intent to kill. With respect to this element, this

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[15] An inmate serving a sentence of life imprisonment may be considered for parole after he has served a minimum of 10 years. Code of Alabama (1975) § 15-22-28(d).

[16] The state argues that had the preclusion clause not existed, Evans still would not have presented lesser included offense evidence because the presentation of such evidence "would have guaranteed him [] a very long term in prison — the very thing he wanted to avoid, even to the point of preferring death instead." Brief for Petitioners at 28. What Evans preferred death to, however, was not "a very long term in prison," but to *life* in prison without any chance for parole. Although the state may not see much difference between a long prison term and life in prison, most defendants confronted with those possibilities assuredly do.

Court recognized in *Beck* that "the Alabama Supreme Court held that the state could not satisfy its burden of proof . . . simply by showing that the defendant intended to commit robbery or even by showing that he should have known that there was a substantial possibility that someone would be killed." 447 U.S. at 628 n.2. In this case, sufficient facts were available to place Evans' capital intent in issue.

From Evans' own testimony before the grand jury, it is clear that he did not enter the victim's pawn shop intending to kill anybody (Tr. 335; J.A. 21).

> Q. Well, have you ever thought of just going out and getting a job, a decent job?
>
> A. Oh, I've done that, sure.
>
> Q. And what made you just leave the job *(inaudible)* and go to, uh, to robbing people?
>
> A. Well, uh, I don't know. Uh, it's kinda like an inner drive, I guess you know, it's something that I always, uh, I've always done ever since, you know, I was a kid. And, uh, it's the easiest way I knew of to make money with, uh, usually the least amount of trouble, you know. Uh, like I said, *you never want to hurt anybody and we always try to pick places to rob that we didn't think anybody would get hurt, you know.* (Emphasis added).

It is equally clear from both Evans' testimony before the grand jury and that of his co-defendant — Ritter — that the only reason the victim was shot was that both defendants were convinced that he was going for his gun, and it was a matter of him or them. Evans testified as follow (Tr. 325; J.A. 12):

> Q. It's my understanding that you made the statement before that you shot him because it was either a matter of him or you, is that correct?
>
> A. Well, you know, my deduction at the time was he was going for a pistol and, uh, I wasn't going to stand there and let him shoot me with it so I fired.

Ritter testified to the same effect (Tr. 340):

> Q. Had you discussed what you were going to do when you got in the s — store?
>
> A. Yeah. John had a pistol and we decided not to take the sawed-off rifle in because it was too big. And I had, uh, some .38 shells. And I was going to ask to see a pistol then John was going to draw his; I would load mine. And we were going to take some guns and the money in the cash register and leave. Uh, but when John, uh, drew his pistol, Nassar dropped down and started crawling toward the office area. And he reached up, like he was going for a gun and that's when he was shot.

Thus, a significant question existed prior to trial as to whether the victim was shot "intentionally" within the meaning of § 13-11-1(a)(2), or out of an instinctive reaction for self-preservation. Indeed, Evans' grand jury testimony raised the issue in precisely those terms (Tr. 333-334, J.A. 19) (emphasis added):

> Q. And, uh, at the time that you shot Mr. Nassar in the back, you knew it was wrong, did you not?
>
> A. I didn't take time to think about it. Uh, . . .
>
> Q. You were going to shoot him [Nassar] if he made that move [for his gun]?
>
> A. I was going to shoot him if reached for a — a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody if you don't have to. That's — that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well, that's — *that's pure instinct. That's self-preservation.* I'm going to fire; I'm not going to waste any time and, uh, I felt like, uh, you know, of course, the man, if I would have — if — if it hadn't happened so quick, if I'd had have time, I would have told him, you know, don't do it, you know, but it just happened too quick.

Had this evidence concerning the instinctive nature of the shooting been presented at trial and developed by competent defense counsel, it clearly would have warranted an instruction on the lesser offense of first degree murder had the preclusion clause not been in effect. Moreover, there might have been other evidence that defense counsel could have presented to support a first degree instruction, or an instruction on some other lesser degree of homicide. Whether such evidence exists simply cannot be fairly determined from this record.

III. EVANS' "GUILTY PLEA" DID NOT WAIVE HIS CONSTITUTIONAL CHALLENGES TO HIS CONVICTION AND SENTENCE

A guilty plea is a guilty plea is a guilty plea. That is the premise underlying the state's contention that Evans waived his constitutional challenges to the procedures under which he was convicted and sentenced to death. The premise is flatly wrong. Try as the state does to camouflage Evans' plea in "just another guilty plea" clothing, the distinctive feature of Evans' plea are far too revealing to allow the state success.

A. Under State Law, Evans' Plea Did Not Waive His Right To Have His Guilt Or Innocence Fairly Determined By A Jury And His Sentence Impartially Imposed.

The foreclosing effect of a guilty plea on a defendant's ability to raise subsequent constitutional challenges to his conviction is initially a matter of state law. *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975). Within constitutional limits, each state may decide for itself which rights are waived by a plea of guilty. Weston, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L.Rev. 1214, 1217 (1977). Under established Alabama law, Evans' unlike the vast majority of defendants both in and out of Alabama who plead guilty, did not waive his right to have his guilt fairly determined in a trial before a jury.

Section 12-16-126 of the Code of Alabama (1975) establishes that the question of a capital defendant's guilt or innocence as well as his punishment must be determined by a jury. That provision, in pertinent part, provides that "the trial of [a capital] case shall be had and the question of the degree of *guilt* must be ascertained and the punishment fixed by a jury. . . ." (Emphasis added.) Similarly, § 15-15-24 of the Code of Alabama (1975) in part provides: "The court *shall not* in any event, however, impose capital punishment without the intervention of a jury." (Emphasis added.) In *Prothro* v. *State*, 370 So.2d 740 (Ala. Cr. App. 1979), the Alabama Court of Criminal Appeals, taking cognizance of these provisions, held (370 So.2d at 746) (emphasis in original):

> *Neither the death sentence nor a sentence to life imprisonment without parole is permissible whether by agreement of all concerned or not, in the absence of a verdict of a jury finding the defendant guilty and fixing his punishment at death.*

As the court explained (370 So.2d at 747):

> The law in Alabama is . . . that only a jury can make a factual determination of guilt and only a jury can fix the punishment at death.

This case proceeded as required under Alabama law. Eight days after his arraignment, Evans was tried before a jury in precisely the same manner as he would have been tried had he pleaded not guilty. That jury was charged with the responsibility for determining Evans' *guilt or innocence*. Evidence was presented, testimony was heard, and objections were made just as though Evans had pleaded not guilty. At the close of the case, the jury was instructed on the elements of the capital offense with which Evans was charged (Tr. 223-224; J.A. 44). They were instructed that Evans was presumed innocent. (Tr. 224-225; J.A. 44-45). They were instructed on the standard of proof beyond a reasonable doubt and told: "Until and unless the State proves the Defendant guilty beyond a reasonable doubt, *you*

cannot convict him." (Tr. 225; J.A. 45). Indeed, specifically addressing Evans' guilty plea, the trial judge instructed the jury that "in reaching your verdict, you may not take the simple approach and say, if the Defendant admits he did it, we go no further." (Tr. 223; J.A. 44).

Thus Evans, his counsel, the trial court and the prosecution all knew that Evans did not and could not waive his right to have his guilt or innocence fairly determined by a jury trial when he entered his plea. Just as in the case of a capital defendant who pleaded not guilty, the dispositive decision on the question of Evans' guilt or innocence was for the jury to make. Consequently, the fact-finding process in Evans' trial, no less than the fact-finding process in Beck's case, was infected by the procedures that this Court found "introduce a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." *Beck* v. *Alabama, supra,* 447 U.S. at 643.

The state has never even suggested that the full jury trial that Evans was afforded to determine his guilt or innocence may have been unnecessary because of his plea. Indeed, in the brief before this Court the state admits: "Under Alabama law, a capital case guilty plea is conclusive on the factual issue when, but only when, the state presents sufficient evidence in addition to the plea for the jury to find the defendant guilty. Brief for Petitioners at 38. The state's position appears to be that although a jury trial to determine guilt as well as punishment is required by state law, that trial may be as lawless, unconstitutional and rigged as possible because the defendant's guilty plea precludes him from complaining about all inadequacies at trial. [17]

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[17] Under this theory, a capital defendant who entered a guilty plea would be precluded from challenging the knowing use of perjured testimony at the statutorily required trial on his guilt or innocence.

The state's contention that the court below misconstrued the effect of Evans' plea under Alabama law or at least erred in failing to certify the question to the Alabama Supreme Court would ignore the dictates of § 12-16-126 and § 15-15-24 and adopt this untenable position. Logic aside, that hope is unfounded because the Alabama Supreme Court has already declined to adopt the state's position at least twice. First, as discussed in the Fifth Circuit's opinion on rehearing, in addressing the plea of Evans' co-defendant — a plea identical to Evans' — the Alabama Supreme Court found that rather than the plea having the preclusive effect asserted by the state, "The trial judge . . . did not accept his guilty plea but instead set the matter for presentation to a jury." *Ritter* v. *State*, 375 So.2d 270, 276 (Ala. 1979) *vacated*, 448 U.S. 903 (1980).

Second, on direct appeal of this case, the Alabama Supreme Court, like the Alabama Court of Criminal Appeals, passed on Evans' constitutional challenges to his conviction and sentence without any intimation whatsoever that Evans' plea waived his constitutional claims or in any way confined or limited appellate review of them.[18] This action was in accordance with Alabama law, which provides for the automatic appellate review of capital convictions regardless of whether the defendant pleaded guilty. Code of Alabama 1975, §§ 12-22-150, 13, 11, 5. Such appellate review is not confined to errors preserved by counsel, but extends to any error prejudicial to the defendant. Code of Alabama 1975, §§ 12-22-41, *Lee* v. *State*, 265 Ala. 623, 93 So.2d 757 (1957). *See Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Thus, the state's assertion that the Court of Appeals misconstrued Alabama law concerning the effect of Evans' plea or at

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[18] The Court of Criminal Appeals specifically held that "we find that the procedures here mandated by the Alabama Statutes fully comport with [the] constitutional demands of the Eighth and Fourteenth Amendments to the United States constitution . . ."

least erred in failing to certify the question to the Alabama Supreme Court is meritless. There is obviously no need for a federal court to certify a question of state law to a state court when the actions and rulings of every level of state court, including the state supreme court, in the very case before the federal court make the answer to the state law question clear.

B. Evans' Plea Does Not Foreclose Federal Review Of His Constitutional Claims

The state seems to argue that regardless of the effect of Evans' plea under Alabama law, federal law forecloses habeas review of his constitutional claims. For two reasons, Evans' plea did not waive or foreclose federal habeas review of his constitutional challenges to his conviction and sentence. First, as just demonstrated, "although termed. . . . a 'guilty plea,' . . . [Evans'] plea had legal consequences quite different from the consequences of the pleas entered in traditional guilty-plea cases." *Lefkowitz* v. *Newsome*, 420 U.S. at 290. Alabama has never treated Evans' plea as " 'a break in the chain of events which has preceded it in the criminal process' " by which "the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Id.* at 289. Instead, both at trial and on appeal, Evans was treated in all respects as he would have been treated had he pleaded not guilty. Where the state does not treat a guilty plea as a "break" in the criminal process which results in the forfeiture of certain rights, so that those rights are preserved in the event that a defendant pleads guilty as well as in the event that a defendant pleads not guilty, "[i]n neither event does the State assert any claim of finality because of the judgment of conviction." *Id.*

Second, the constitutional deprivations of which Evans complains — the faulty fact-finding process at his trial and the institutionalized bias for death at his sentencing — are deprivations that occurred *after* Evans pleaded guilty. Both *Lefkowitz* v. *Newsome*, *supra*, and *Tollett* v. *Henderson*, 411 U.S. 258

(1973) make clear that such claims are not waived or forfeited under federal law. [19] In *Newsome* this Court noted that *Brady* v. *United States*, 397 U.S. 742 (1970), and its companion cases held only that "a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the *pretrial* proceedings." 420 U.S. at 288 (emphasis added). As explained in *Tollett*, 411 U.S. at 267 (emphasis added):

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea*."

The state, however, implies that *Newsome* and *Tollett* were disapproved or even overruled by a footnote in this Court's *per curiam* decision in *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975). That footnote plainly did not overrule *Tollett* or *Newsome*. Indeed, *Newsome*, a full decision on the merits decided only nine months before the issuance of the *per curiam* in *Menna*, is not even cited, let alone discussed and overruled, in *Menna*.

Moreover, even indulging the state's assumption that the *Menna* footnote is now the sole and dispositive guideline for determining, as a matter of federal law, which claims are

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[19] Contary to the state's intimation, *Brady* v. *United States*, 397 U.S. 742 (1970), does not hold or even hint otherwise. The state suggests that "[b]ecause the defect involved in *Brady* . . . *concerned* the punishment provisions of the statute, it cannot be categorized as a defect antecedent to the plea." Brief for Petitioners at 40 (emphasis added). However, Brady's constitutional claim was not that the punishment procedure to which he was actually subjected was unconstitutional, but rather that because the potential for a capital sentence existed only if he went to trial, his guilty plea itself was involuntary. In sharp contrast, Evans does not challenge the voluntariness of his plea, but claims, among other things that the sentencing procedure as actually applied to him deprived him of due process by unduly biasing the sentencing judge towards death.

forfeited as the result of a guilty plea, Evans did not lose his right to challenge his constitutionally unfair trial by pleading guilty. As the Court explained in that portion of the *Menna* footnote quoted in the state's brief at 41, "A guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the *valid* establishment of factual guilt. . . ." (Emphasis added.) In the case of a capital defendant, Alabama has decided that a guilty plea does not and cannot as a matter of law "valid[ly] establish [] factual guilt." Under unequivocal Alabama law — and the state does not contend otherwise — the factual guilt of a capital defendant can only be validly established after a full trial before a jury. Therefore, the constitutional violations of which Evans complains — defects at the trial to determine his factual guilt which this Court has already held "in every case . . . introduce a level of uncertainty and unreliability into the fact-finding process, 447 U.S. at 443" were not forfeited by his plea.

IV. THE COURT BELOW WAS CORRECT IN REFUSING TO CERTIFY STATE LAW QUESTIONS TO THE ALABAMA SUPREME COURT

The state filed a motion in the Fifth Circuit asking that court to certify seven questions of state law to the Alabama Supreme Court. (J.A. 68-69). Of those seven, only two remain for consideration. The first of these questions concerns the issue whether the record of Evans' trial would support a lesser included offense instruction. The second concerns the effect under Alabama law of Evans' guilty plea at arraignment. Neither of these questions is appropriate for certification.

A. Certification Is Appropriate Only Where The Issue Of State Law Is Uncertain

Certification is a form of abstention and the traditional requirements of abstention law are plainly applicable to certification questions. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391

(1974). The essential prerequisite for abstention and hence certification is the existence of an "uncertain issue of state law," the resolution of which may eliminate or materially alter the federal constitutional question. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971) citing *Harmon* v. *Forssenius*, 380 U.S. 528, 534 (1965). The state has clearly failed to establish this pre-requisite.

The first issue on which the state sought certification is plainly inappropriate for its use. As previously noted, the existence or non-existence of evidence of lesser included offenses in the trial record is an irrelevant inquiry because of the effect of the preclusion clause. See pp. 20-24, *Supra*. Even if such inquiry were relevant, the state law concerning lesser included offense intructions is anything but uncertain. Quite the contrary, the cases outlining the required standard for lesser included offense instructions under Alabama law are legion. As the Court of Criminal Appeals recently noted

> A court may properly refuse to charge on a lesser included offense only (1) when it is clear to the judicial mind that there is no evidence to bring the offense with the definition of the lesser offense, or (2) when the requested charge would have a tendency to mislead or confuse the jury.

Harris v. *State*, 398 So.2d 777, 778 (Ala. Cr. App. 1981) *cert. denied*, 398 So.2d 780 (Ala. 1981). In fact, in Alabama,

> . . . every accused is entitled to have charges given, which would not be misleading, which would correctly state the law of his case, and which are supported by any evidence, however weak, insufficient or doubtful in credibility.

Chavers v. *State*, 361 So.2d 1106, 1107 (Ala. 1978). It is thus readily apparent that questions about whether particular lesser included offense instructions should have been given, do not involve "uncertain questions of state law" and therefore are improper for certification. *Lake Carriers Association* v. *MacMullan*, 406 U.S. 498, 511 (1972). Federal courts are obvious-

ly as competent as state courts to apply settled state law to the facts of a particular case.

This principle applies with equal force to the guilty plea question. The law surrounding guilty pleas in capital cases is well settled by statute and case law. See pp. 29-33, *supra*. The particular legal issue that the state seeks to have certified is not uncertain, but has been recently clarified by the state court system in *Prothro* v. *State*, 379 So.2d 740 (Ala. Cr. App. 1979).

Thus, the decision of the court below not to utilize a certification procedure was correct. There is no "broad encyclical commanding automatic remission" of these state law questions to state court. *Zwickler* v. *Koota*, 389 U.S. 241, 249-251 (1967). Rather as this court has often said, abstention, hence, certification "should not be ordered merely to await an attempt to vindicate a claim in state court." *Wisconsin* v. *Constantineau*, 400 U.S. at 439. Where, as here, there is no ambiguity in the state law, "the federal court should not abstain but should proceed to decide the federal constitutional claim." *Id.*

B. In This Case, The State's Request For Certification Was A Blatant Attempt At Forum Manipulation

To support its contention that the Fifth Circuit erred in declining to certify any questions to the Alabama Supreme Court, the state piously invokes the policy of "cooperative judicial federalism," and laments the damage to that policy allegedly wreaked by the decision below. Brief for petitioners at 46. In light of the state's actions in this case, its invocation of the policy of "cooperative judicial federalism" rings hollow, and amounts to nothing more than a disingenous attempt to manipulate state and federal forums to suit whatever momentarily appears to be in the state's interest.

On April 24, 1979, the state, by letter, notified Evans' counsel of the state's position concerning the exhaustion of remedies in this case when this case was before the district court. In this letter[20] Mr. Carnes, the Alabama Assistant Attorney General who has represented the state throughout this proceeding, wrote:

> It is respondents' position that petitioner exhausted all of his state remedies in regard to issues raised in his petition now pending in the United States District Court for the Southern District of Alabama. . . . Finally, it is respondents' position that petitioner has exhausted all other issues and claims of whatever nature.

He ended the letter by stating:

> Respondents hereby stipulate and admit that petitioner has exhausted all state remedies that are available to him as to any and all issues and claims concerning his conviction and sentence.

Thus, on April 24, 1979, the state acted to compel the federal court system to decide every issue conceivably presented by this case. The state specifically waived its right to have the state courts act in any way.[21] After this Court's decision in *Beck*, however, the state drastically changed its tune. It suddenly saw the "virtues" of having certain questions considered by the Alabama Supreme Court so that the Fifth Circuit might be spared the task of ruling on those questions that the state was only too happy to have the federal courts decide in 1979.

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[20] A copy of the letter was attached to the supplemental brief filed by Evans in the Fifth Circuit. In its answer to Evans habeas petition in the district court, the State expressly waived the exhaustion of remedies requirement. (R. 61).

[21] This waiver, as the states recognized, was proper and effective. *Warren* v. *Connor*, 365 F.2d 590 (5th Cir. 1966); *Tolg* v. *Grimes*, 355 F.2d 92 (5th Cir. 1966).

Although exhaustion and certification are two different types of federal court abstention, they involve the same policies and interests. Like certification, the doctrine of exhaustion rests on concepts of comity rather than jurisdiction. Both certification and exhaustion are doctrines

> . . . which [teach] that one court should defer action on causes properly within its jurisdiction until courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter.

Fay v. *Noia*, 372 U.S. 391, 419-420 (1963). The state's actions in this case show that the state's interest is not in maintaining the proper relationship between state and federal courts, but rather in seeking whatever forum it believes to be most favorable at a given time.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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